

RICHARD K. STOVALL
AMY L. BOSTIC
THOMPSON HINE & FLORY LLP
One Columbus
10 West Broad Street, Suite 700
Columbus, Ohio 43215-3435

JULIE M. LYNCH
Whitehall City Attorney
City of Whitehall
360 S. Yearling Road
Whitehall, Ohio 43213

Counsel for the City of Whitehall

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

In re:

Chapter 11

RANDALL'S ISLAND FAMILY GOLF
CENTERS, INC., et al.

Case Nos. 00 B 41065
through 00 B 41196 (SMB)

Debtors.

-----X

**RESPONSE BY THE CITY OF WHITEHALL TO THE
AIRENA INC. OBJECTION TO SALE OF
PROPERTY AUCTION SALE #233**

The City of Whitehall ("City"), by its counsel, Richard K. Stovall, hereby files this Response to the *Airena Inc. Objection to Sale of Property Auction Sale #233* ("Objection"). The City is a party to a certain Lease effective April 1, 1995 between the City and Golf Corporation of America, Inc. The Lease was assigned to Whitehall Family Golf Centers, Inc. as of May 28, 1998 and relates to Site #233. The City was the successful bidder of Site #233 at the auction conducted on February 9, 2001 in accordance with all bidding and sale procedures set forth in this Court's Order dated January

23, 2001 inter alia, *Authorizing and Scheduling An Auction For The Sale of the Debtor's Assets and Establishing a Deadline For Submission of Cure Amounts and Other Material Information With Respect to Such Certain Leases to be Sold* ("Order"). The City has submitted its security deposit as required and is fully prepared to consummate the transaction. The City files this Response to the Objection both in its capacity as a landlord and as the Successful Bidder.

The Objection filed by Airena Inc. ("Airena") is based upon a faulty conclusion that it somehow "retained" title ownership to certain property located at Site #233, notwithstanding shipment and delivery to the Debtors of property. Airena bases this unwarranted conclusion on provisions in a purported Sales Agreement, attached as Exhibit "A" to the Objection.

Airena contends in its Objection that the Debtors do not possess legal title to the "tennis dome" located on Site #233 and, thus, that property is not property of the estate under 11 U.S.C. §541. Apparently, Airena contends that as such, the Debtors do not have the ability to sell this asset under 11 U.S.C. §363(f). Both of these conclusions are meritless.

The Sales Agreement which Airena has attached to its Objection contains the following provision upon which Airena bases its whole argument: "Title to the dome and equipment shall pass to Buyer after the terms and conditions of this contract and any addendums have been fully met, including Item 11." Item 11 sets forth the payments terms. Airena contends that because the Debtors defaulted under the payment terms, then legal title to the personalty did not pass to the Debtors.

Airena's transaction with the Debtor is subject either to the Uniform Commercial Code ("UCC") or the laws of the State of Ohio concerning real property interests. If analyzed under the UCC, it is clear that Airena at best holds nothing more than an unperfected security interest.

Provisions such as the one relied upon AirenA in its Sales Agreement are specifically identified in the UCC and referred to as “reservation of title” provisions or “title retention contracts”. It is clear from several provisions of the UCC that such provisions are limited to effectuating a security interest in the goods in favor of the seller and do not in any way delay the passing of legal title. Specifically, section 1-201(37) states “The retention or reservation of title by a seller of goods notwithstanding shipment or delivery to the buyer . . . is limited in effect to a reservation of a ‘security interest’”. Additionally section 9-102(2) of the UCC specifically states that “this Article applies to . . . title retention contracts.”

Courts interpreting section 1-201(37)¹ have uniformly held that “title retention contracts” are nothing more than security agreements. See, generally, In re Hillebrand Metal Works, Inc., 38 B.R. 956, 958 (Bankr. N.D. Ill. 1984), aff’d 43 B.R. 480, and cases cited therein. Accordingly, at best AirenA has a security interest in certain personal property now located at Site #233. As such, AirenA offers no proof of perfection of this security interest under the UCC.

If AirenA’s sale to the Debtor is not a sale of personalty, then its “retained” interest presumably is one of an interest in the underlying real estate either as a fixture or an encumbrance on the Debtors’ leasehold. AirenA has presented no evidence that it holds an interest which could withstand scrutiny under 11 U.S.C. §544. AirenA has not filed any documents with the Franklin County, Ohio Recorder’s Office that would subject its interest to a bonafide purchaser of the real estate or of the Debtors’ leasehold.

¹ Ohio and Minnesota have adopted similar UCC provisions and courts in those jurisdictions have consistently interpreted those provisions consistent with the *Hillebrand* decision. See, Talcott v. Franklin National Bank of Minneapolis, 194 N.W. 2d. 775, 780 (Minn. 1972), referencing an Ohio pre-code decision of *Sussen Rubber Co. v. Hertz*, 249 N.E. 2d. 65 (Ohio App. 1969).

Airena's interest, whether it be a security interest or an interest in the Debtors' leasehold, is precisely the interest which §363(f) of the Bankruptcy Code is designed to permit a sale free and clear of, with such interest attaching to the proceeds of sale. Undoubtedly, Airena's interest is in bonafide dispute. The City of Whitehall stands ready and able to close its transaction with the Debtor and provide a source of funds from which Airena's interest, and possibly other claimants' interest, may be satisfied once those interests are finally determined and allowed.

For these reasons, the City respectfully requests that the Court overrule Airena's Objection and allow the parties to consummate the transaction in a manner consistent with the procedures outlined and approved by this Court in the Order.

Dated: February 16, 2001

RICHARD K. STOVALL
AMY L. BOSTIC
THOMPSON HINE & FLORY LLP
One Columbus
10 West Broad Street, Suite 700
Columbus, Ohio 43215-3435

Counsel for the City of Whitehall

By: Richard K. Stovall
Richard K. Stovall
Admitted *pro hac vice*

Daniel A. Cohen (DAC-8719)
KORNSTEIN VEISZ & WEXLER, LLP
757 Third Avenue
New York, New York 10017
(212) 418-8600

Richard K. Stovall
Amy L. Bostic
THOMPSON HINE & FLORY LLP
One Columbus
10 West Broad Street
Columbus, Ohio 43215-3435

Attorneys for City of Whitehall

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

	X	
	:	
In re:	:	Chapter 11
	:	Case Nos. 00-B-41065 (SMB)
RANDALL'S ISLAND FAMILY GOLF	:	through 00-B-41196 (SMB)
CENTERS, INC., et al.,	:	
	:	(Jointly Administered)
Debtors.	:	
	X	

CERTIFICATE OF SERVICE

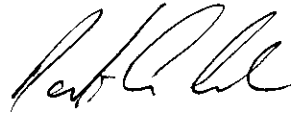
DANIEL A. COHEN, under penalty of perjury, states:

I am over eighteen (18) years of age, am not a party to this action and reside within New York, New York.

On February 16, 2001, I caused to be served facsimile delivery, a true copy of the **Response by the City of Whitehall to the Airena Inc. Objection to Sale of Property Auction Sale #233**

upon the persons listed below:

Dated: New York, New York
February 16, 2001



Daniel A. Cohen

FAMILY GOLF CENTERS, INC
538 Broadhollow Road, Suite 410E
Melville, NY 11747
Attn: Mr. Philip J. Gund
(631) 694-1935

MORGAN, LEWIS & BOCKIUS
101 Park Avenue
New York, NY 10178-0060
Attn: Richard S. Toder, Esq.
(212) 309-6273

GOLENBOCK, EISMAN, ASSOR & BELL
437 Madison Avenue
New York, NY 10022
Attn: Jonathan L. Flaxer, Esq.
(212) 754-0330

KEEN REALTY CONSULTANTS, INC.
60 Cutter Mill Road, Suite 407
Great Neck, NY 11021-3104
Attn: Harold J. Bordwin, President
(516) 482-5764

OFFICE OF THE UNITED STATES TRUSTEE
33 Whitehall Street, 21st Floor
New York, NY 10004
Attn: Brian Shoichi Masumoto, Esq.
(212) 668-2255

Bartlett, McDonough, Blastone & Monaghan
81 Main Street, Fourth Floor
White Plains, New York 10601
Attn: Gina Bernardi
(914) 448-0215

BERLACK, ISRAELS & LIBERMAN LLP
120 West 45th Street
New York, NY 10036
Attn: Edward S. Weisfelner, Esq.
(212) 704-0196